IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.111 OF 2007
WITH
CIVIL APPLICATION NO.162 OF 2007

Amrohan Sarif Khan. ..Appellant.

V/s.

The Municipal Corpn. of Gr.Mumbai. ..Respondent.

Mr.B.P.Shukla for appellant.

Mrs. Geeta Joglekar for Respondent.

CORAM: A.M.KHANWILKAR,J

DATE : FEBRUARY 26, 2007.

P.C. :

1. Heard counsel for the parties.

2. This appeal takes exception to the Judgment and Order dated 2nd December, 2006 in the Notice of Motion No.3275 of 2006 passed by the Judge, City Civil Court, Gr.Bombay. The respondent-Corporation issued show cause notice to the appellant, purported to be under section 354-A, stating that construction of unauthorised structure was in progress and that should be stopped forthwith. This notice is challenged by the appellant before the trial Court by way of suit being L.C.Suit No.3307 of 2006. In the said suit, appellant took out Notice of Motion

No.3275 of 2006 and asked for following interim relief during the pendency of the suit.

> "a) that pending the hearing and final disposal of the suit, the Defendants, their servants agents and all persons claiming through them or under them be restrained by an order and injunction of this Honourable Court from in any manner removing and/or pulling down and/or demolishing the suit premises viz. structure admeasuring 12' x 20' situated at Sarafatkhan Chawl, Old Bus Depot, Marol Maroshi Road, Andheri(E) Mumbai 400059 in pursuance of notice dated 12/7/2006 issued U/s 354-A of B.M.C. Act and order dated 10/8/06 passed by Asst. Engineer (B&F) K/East Ward;
>
> b) interim and ad-interim reliefs in terms of prayers (a) above;
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> c) cost of this notice of Motion be provide for;
>
> d) for such other and further reliefs as this Honourable Court may deem fit and proper."

3. The trial Court after considering material on record, opined that the suit notice was vague. There was absolutely no mention either of original height nor about the fact as to height has been raised from the original position. It has also found as of fact that no panchanama was drawn by the official of the Corporation at the relevant time to establish the fact that construction activity was in fact in

progress at the relevant time. However, the Court has relied on the photograph taken on 12th July, 2006 to answer the issue against the appellant and to accept the claim of the Corporation. There is some controversy about the date on which the said photographs were taken. Accordingly to the appellant, photographs must have been taken on 12th June, 2006 which is reflected in the photographs itself. Whereas, according to the Corporation, Photograph was taken on 12th July, 2006.

4. Be that as it may, mere photograph cannot be the basis to answer the issue against the appellant. Other issue in particular, non-preparation of panchanama at the relevant time goes to the root of the matter. The trial Court inspite of having recorded that finding, has committed error in dismissing the Notice of Motion in the fact situation of the present case. As prima facie case was made out by the appellant, appellant would be entitled to interim protection during the pendency of the suit.

5. Even if this appeal succeeds and the notice of motion taken out by the appellant was to be made absolute in terms of prayer clause (a), that however, will not preclude the Corporation from initiating

action under section 351 of the Act, which is an independent action and the appellant will have to satisfy the competent authority that the structure which is standing as of now is put up after taking valid permission or in any case, it is a protected structure. Those questions are left open to be decided in the proposed action under section 351 to be taken by the Corporation.

6. Accordingly, this appeal succeeds, the impugned Judgment and Order is set aside, instead the Notice of Motion preferred by the appellant is made absolute in terms of prayer clause (a), however, subject to observations made in the earlier paragraph that it will be open to the Corporation to proceed with the action under section 351 of the Act.

7. Appeal as well as civil application disposed of on the above terms.